Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests	)	WT Docket No. 97-192
For Relief From State and Local	)	FCC 97-303
Regulations Pursuant to	)	
Section 332(c)(7)(B)(v) of	)	
Communications Act of 1934	)	

Reply Comments of Sprint Spectrum L.P. d/b/a Sprint PCS

I. Reply Comments on "Final Action"

As explained in Sprint PCS's initial Comments, wireless telecommunications carriers needing to locate service facilities face a very real problem: the administrative process abuse prevalent in many communities that are fundamentally opposed to locating wireless telecommunication facilities within their borders.

The FCC should not adopt the definition of "final action" proposed by the National League of Cities (NLC) and the Concerned Communities and Organizations (CCO). NLC and CCO argue that "final action" means that aggrieved carriers are required to exhaust all state administrative appeals of final administrative decisions, and that "final action" only means that aggrieved carriers are not required to exhaust state court remedies. NLC and CCO's proposed definition encourages delay and abuse of the administrative process.

NLC and CCO's proposal is also inconsistent with federal law on what constitutes a "final action." Once a definitive decision is reached by the initial decision maker,

carriers have the right under §§ 332(c)(7)(B)(iv) & (v) to seek relief from a court of competent jurisdiction or the FCC for a state or local government's violation of the Communications Act.

The United States Supreme Court has held that "final action" means that **"the initial decisionmaker . . . arrive[d] at a definitive position on the issue that inflicts an actual, concrete injury."** Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In Weissman v Fruchtman, 700 F.Supp. 746 (S.D.N.Y. 1988), the U.S. District Court held **"[A]n administrative decision may be a sufficiently final action to satisfy the finality requirement without representing an exhaustion of all available administrative remedies."** 700 F.Supp. at 755. "A final agency action is one that imposes an obligation, denies a right, or fixes a legal relationship." Geyen v Marsh, 775 F.2d 1303 (5th Cir. 1985), citing United States Department of Justice v Federal Labor Relations Authority, 727 F.2d 481, 493 (5th Cir. 1984).

Finality is an indication that a claim is ripe for adjudication. The ripeness doctrine is designed, in part, "to protect [administrative] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Weissman, supra. at 756, quoting Abbott Laboratories v Gardner, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

Finality is not the same as "exhaustion of remedies." "It is important to distinguish the doctrines of finality and exhaustion . . . Finality, although closely related to exhaustion, concerns what agency actions are reviewable, regardless of when they may be reviewed." Geyen, supra. at 1309, fn 6; see also Weissman, supra. Section

332(c)(7)(B)(v) provides for when a final action is reviewable: Aggrieved persons may commence an action in a court of competent jurisdiction within 30 days of the final action. Alternatively, an aggrieved person may petition the FCC for relief. See §332(c)(7)(B)(v). Adopting NLC and CCO's position does not promote the objective of the Communications Act to allow the placement, construction, and modification of personal wireless facilities in a "reasonable period of time," especially given the very real administrative abuses that exist.

II. Reply Comments on FCC Jurisdiction

NLC claims that nothing in the Communications Act "limits or affects local authority over decisions relating to the placement construction or modification of personal wireless facilities." That claim is plainly wrong on a number of counts. For the purposes of this rulemaking, it is probably sufficient, however, to point out the obvious §332(c)(7)(B)(iv) restrictions on state and local actions affecting "placement, construction or modification of personal wireless facilities." Section 332(c)(7)(B)(iv) states:

> **No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions** to the extent that such facilities comply with the Commission's regulations concerning such emissions. (Emphasis added.)

Similarly, there are no legitimate grounds for NLC and CCO's claim that the FCC's jurisdiction is "strictly limited" in terms of the FCC enforcing §332(c)(7)(B)(iv).[1]

[1] Nor is this a case of the FCC conscripting state and local governments to enforce a federal program, as CCO suggests by its citation of Brady.

NLC and CCO argue that the FCC is restricted to conducting some type of very limited appellate review of the sort that a state court might be restricted to in reviewing municipal actions, proposing that the FCC give "substantial deference to local government decision-making bodies." But, FCC enforcement of §332(c)(7)(B)(iv) does not involve a review of what regulatory or legislative authority a municipality has under state law or municipal charter, for example, where that type of deferential standard is more likely to be applied. Nor is it like state court appellate review of a specialized, technical agency action, such as state court appellate review of a state Public Service Commission rate order, for example. State and local authorities have no greater specialized, technical expertise to evaluate RF compliance than the FCC does.

Federal law (§332(c)(7)(B)(iv)) clearly prohibits state and local government actions regulating the placement, construction, and modifications of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions, and §§332(c)(7)(B)(iv) & (v) allow aggrieved persons a cause of action that may be brought in court or before the FCC to enforce federal law.

III. Reply Comments on "Failure to Act"

Sprint PCS supports CTIA's and GTE Service Corp.'s proposal that state and local governments should be deemed to have failed to act after a certain period of time. Sprint PCS has proposed that "an action shall be deemed a 'final action' if upon applicant's submission of a complete application, the state or local government or instrumentality fails to render a decision within (a) 120-days, or (b) the time periods, if any, for decision-making processes prescribed in applicable zoning laws, whichever is

earlier." CTIA proposes a 90-day time period, and GTE Service Corp. proposes a 180-day time period.

The FCC should reject NLC and CCO's proposal that a "failure to act" should be judged against the time frame for similar requests in the particular community at issue. CCO suggests that aggrieved carriers should not even be allowed to petition the FCC unless they demonstrate how long the municipality took, over the preceding three years, to act on the same type of approval.

It bears repeating that administrative process abuse is prevalent in many communities fundamentally opposed to locating wireless telecommunications facilities within their borders. CCO's proposal seems like little else but an obvious attempt to put up yet another procedural obstacle. Assuming a municipality opposed to siting facilities in within its borders would even cooperate in turning over the information, requiring carriers to conduct a new analysis in every community before they can even start an action to enforce a statutory right is overwhelmingly burdensome, and doesn't serve the express mandate of the Communications Act that local authorities make a decision on the placement, construction, and modification of personal wireless facilities within a "reasonable period of time." Section 332(c)(7)(B)(ii). The very process of seeking review by the FCC of whether a government entity has "failed to act" on a case-by-case basis will only exacerbate the delay inherent in the failure to act itself. Instead, the terms should be defined in manner that establishes a time period after which the state or local government's failure to conclude its process will be deemed a "final action."

As explained in Sprint PCS's initial Comments, in communities that oppose wireless telecommunication facilities, it is not unusual for an applicant to experience one

or more of the following: refusal of the zoning authority to accept the application for filing, imposing in effect an informal moratorium; serial requests for additional information before the application is deemed complete and ready for hearing; failure to schedule the application for hearing; tabling of the application for one or more meetings; failure to close the hearing in order to avoid triggering any time periods during which a final decision must be made on the application; after the application is pending, the imposition of a formal moratorium prohibiting continued processing; adoption of a new ordinance to be applied retroactively to pending applications; and diversion of the application to the state's environmental review process, a process which often absorbs 6 critical months before the application can be returned to the zoning process.

By adopting a 120-day rule (or similar time frame), the FCC will promote competition in the wireless telecommunications industry and establish a period of time after which an applicant adversely affected may commence an action in court or petition the FCC for relief. Without an FCC rule imposing finality upon what can be endless procedural obstacles, communities seeking to avoid the Communications Act will continue to impede the very competition the Act is intended to foster by engaging in administrative process abuse.

IV. Reply Comments on the Compliance Demonstrations

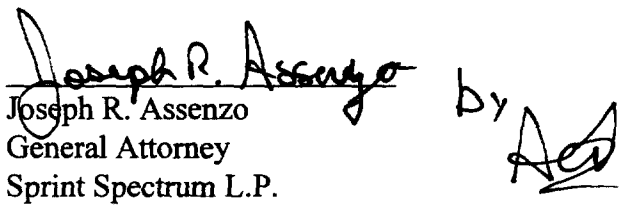
NLC and CCO suggest that adopting the more limited compliance showing for categorically exempt facilities or a rebuttable presumption somehow has the effect of stifling public safety concerns. To begin with, the FCC has already found "For transmitting facilities, operations and devices not specifically identified, the Commission

has determined, based on calculations, measurement data and other information, that such RF sources offer little potential for causing exposures in excess of the guidelines. Therefore, the Commission 'categorically excluded' applicants and licensees from the requirement to perform routine, initial environmental evaluations of such sources to demonstrate compliance with our guidelines." OET Bulletin 65, p 13. Similarly, the FCC correctly concludes in its NPRM that "because [categorically excluded facilities] are extremely unlikely to cause routine exposure that exceeds the guidelines, applicants for such facilities are not required to perform any emissions evaluation as a condition of license, unless specifically ordered to do so by the Commission." NPRM, Paragraph 9.

Moreover, legitimate local concerns are already fully protected by current FCC procedures that interested parties may participate in, as discussed in Sprint PCS's initial Comments. There is no issue of somehow stifling local participation, but rather allowing for it in a way that promotes the objectives of the Communications Act. Under §1.1307(c), for example, covering categorically excluded facilities, an interested person may submit a petition to the FCC setting forth in detail the reasons for justifying or circumstances necessitating environmental consideration by the FCC. And, under §1.1308(b), when an Environmental Assessment is filed, the FCC (or Bureau) may request further information from interested persons, to assist in making a determination of whether the proposal will have a significant environmental impact. Further, under §1.1313, objections to applications based on environmental considerations may be filed as petitions to deny. In addition, the filing of an Environmental Assessment is published by the FCC in the Federal Register, and interested parties have an opportunity to comment or take other action that may be appropriate. Those regulations and procedures

protect legitimate local concerns on RF exposure compliance issues, while also protecting broader public interests and promoting Communication Act objectives – such as competition and the introduction of new and innovative telecommunications services, and other public benefits associated with those things – as well as tempering administrative process abuse by local authorities. The FCC is the more appropriate forum to deal with RF exposure compliance issues, than permitting local authorities to conduct detailed compliance reviews.

Respectfully submitted,



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